



January 17, 2001

Ms. Carol Day-Moss
Assistant County Attorney
Hunt County
4th Floor Courthouse
P.O. Box 1097
Greenville, Texas 75403-1097

OR2001-0179

Dear Ms. Day-Moss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143239.

The Hunt County Sheriff's Office (the "sheriff") received 13 separate requests for information from a single requestor. You inform this office that a portion of the requested information has been released to the requestor, but claim that the remainder of the information responsive to the request is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, you inform this office that with regard to the request for certain information related to any barricaded person for the period of January 1, 1996 through September 30, 2000, the sheriff kept no specific statistics on barricaded persons prior to June 1, 1999. In this regard we note that Chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open

¹We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990). Further, the fact that it may be burdensome to provide the information does not relieve a governmental body of its responsibility to comply with the Public Information Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (1976), *cert. denied*, 430 U.S. 931 (1977) (cost or difficulty in complying with act does not determine availability of information), Open Records Decision No. 497 (1988). If the sheriff holds information from which the requested information can be obtained, the sheriff must provide that information to the requestor unless it is otherwise excepted from disclosure.

We next address your argument that a portion of the information responsive to the above-referenced request is excepted from disclosure under common law privacy. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common law privacy. For information to be protected from public disclosure under the common law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. 540 S.W.2d at 685; Open Records Decision No. 611 at 1 (1992). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also* Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common law privacy). We have marked the types of information in the submitted exhibits that must be withheld under section 552.101 in conjunction with common law privacy.

You also argue that certain information responsive to the above-referenced request is excepted from disclosure under section 552.108. Section 552.108, the "law enforcement exception," provides in relevant part:

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

You make several arguments for withholding the submitted information under section 552.108. Initially, with regard to the information in Exhibits 15-17, you argue that the “information requested regarding any ‘barricaded person or hostage situation’ is excepted from public disclosure if any of (that information) pertains to the internal record or notation to investigations that did not result in convictions or deferred adjudications as provided by section 552.108(b)(2).” You similarly argue that the responsive information pertaining to domestic violence in Exhibit 18, and the responsive information relating to the “arrest, detainment or detention of Richard Scott Sullivan, Jr.” in Exhibit 19, is excepted under section 552.108(b)(2) if any of that information pertains to internal records or notations relating to investigations that did not result in convictions or deferred adjudications.

To establish the applicability of section 552.108(b)(2), a governmental body must demonstrate that the requested internal records or notations relate to a criminal investigation that has *concluded in a final result* other than a conviction or deferred adjudication. Subsection (b)(2) cannot apply to an open criminal file because the investigation or prosecution for such a file has not concluded.

In this case, you state only that *if* any of the requested information pertains to the internal record or notation to investigations that did not result in convictions or deferred adjudications, it should be withheld under section 552.108(b)(2). You do not inform us whether the information contained in Exhibits 15-17, 18 or 19 apply to pending or concluded criminal investigations, nor are we able to determine from the face of the submitted documents the status of the investigations. Therefore, we find that the information in Exhibits 15-17, 18 and 19 may not be withheld pursuant to section 552.108(b)(2).

You also argue that the information in Exhibits 15, 15a-15c, 16, 16a-16h, 17, 17a-17b, 20, 21, 21a, 22, 22a and 23 is excepted pursuant to section 552.108(b)(1) as information the release of which would interfere with law enforcement or prosecution. Generally, a

governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You argue that release of the information containing diagrams of the premises where the barricaded persons were found would reveal law enforcement techniques and unduly interfere with law enforcement. You further assert that the notations of procedures and techniques disclose specific operations directly related to the investigation and detection of crime and management of these barricaded persons. You state that the pages marked Exhibits 15, 16, 17, 21, 21a, 22, and 22a contain internal notations of the sheriff regarding the "mission" as well as possible changes that need to be made in procedures for future missions. You further state that release of the information in Exhibit 20 relating to the operational policies of the sheriff's tactical officers could endanger the lives of officers in the field.

Upon review of the information contained in Exhibits 15, 15a-15c, 16, 16a-16h, 17, 17a, 17b, 20, 21, 21a, 22, 22a, and 23, and your arguments against disclosure, we conclude that release of a portion of the information in these exhibits would interfere with law enforcement, and therefore this information may be withheld under section 552.108(b)(1). *Cf.* Open Records Decision No. 531 (1989) (release of specific guidelines on use of force could impair officer's ability to arrest suspect or protect public peace, and thus, release of detailed guidelines would unduly interfere with law enforcement and crime prevention). We have marked the information that may be withheld under section 552.108(b)(1).

We conclude you have not demonstrated how release of the remaining information in these exhibits would interfere with law enforcement, and therefore this information may not be withheld under section 552.108(b)(1).

We note that contained within the submitted information which we rule may not be withheld under section 552.108, there are driver's license, license plate and social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the Public Information Act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that the federal statute provides that the *law* requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information.

Section 552.130 of the Government Code provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, under section 552.130, the sheriff must withhold any Texas driver's license numbers and motor vehicle title or registration information from the documents required to be released. We have marked a sample of the type of information that must be withheld under section 552.130.

We also note that criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the CHRI that must be withheld.

Finally, we note that the submitted documents include a search warrant and search warrant affidavit. You must release the search warrant affidavit as it has been executed. Code Crim. Proc. art. 18.01(b) (search warrant affidavit is public if executed). You must also release the search warrant as it appears to have been filed with a court. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992).

To summarize, we have marked the information contained Exhibits 15, 15a-15c, 16, 16a-16h, 17, 17a, 17b, 20, 21, 21a, 22, 22a, and 23 that may be withheld from disclosure under section 552.108(b)(1). We have also marked the information within the submitted exhibits that must be withheld under common law privacy. The criminal history information that we have marked must be withheld under section 552.101. Social security numbers may be required to be withheld under section 552.101 in conjunction with federal law, and driver's license numbers and motor vehicle title or registration information must be withheld under section 552.130. The remainder of the submitted information must be released to the requestor, including the search warrant and search warrant affidavit.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 143239

Encl. Submitted documents

cc: Mr. Brian T. Galindo
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(w/o enclosures)